ORDERED.

**Dated: March 11, 2021**

Catherine Peek McEwen
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Chapter: 11

Save Money and Retain Temperature, LLC,
Debtor.

Case No.: 8:19-bk-04090-CPM

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Save Money and Retain Temperature, LLC,
Plaintiff,

v.

Adv. Proc No: 8:20-ap-00546-CPM

Heritage Property and Casualty Insurance Company,
Defendant.

_____/

**ORDER ON DEFENDANT'S MOTION TO DISMISS**

THIS PROCEEDING came on for hearing on January 28, 2021, for consideration of the Motion to Dismiss Adversary Proceeding (the "Motion") (Doc. No. 17) filed by the Defendant, Heritage Property and Casualty Insurance Company ("Heritage") and related papers. As set forth in the Complaint, the Plaintiff, Save Money and Retain Temperature, LLC ("SMART"), seeks "a declaratory judgment in its favor declaring that [certain state court litigation identified as the 'Par Action'] and the underlying claim therein is property of the bankruptcy estate." The Motion asserts that this proceeding should be dismissed because, according to the Defendant, the assignment of

insurance benefits ("AOB") at issue in the Par Action, a copy of which is attached to the Complaint, was ineffective due to the Plaintiff's use of an allegedly unregistered fictitious name and/or because the Plaintiff filed the Par Action using such name in contravention of § 865.09 of the Florida Statutes.[1] Having reviewed the AOB, the Court notes that the allegedly unregistered fictitious name to which the Defendant objects—"Smart Efficient Solutions, *LLC*" (emphasis added)—is used to identify the Plaintiff as the "Contractor" just once in the AOB, in the preprinted title. The fictitious name *actually* registered—"Smart Efficient Solutions"—is used three times: once in the preprinted company logo at the top of the AOB, a second time is inserted in handwriting to identify the Plaintiff as the "Contactor" in the signature block, and a third time is inserted once more in handwriting to identify the signatory as the CEO of the Plaintiff.[2]

As alternative relief, the Motion seeks an order requiring the Plaintiff to replead with greater specificity and to join all necessary parties. In support of this alternative relief, the Motion states:

> If the Debtor is merely seeking a declaratory judgment that it is the equitable owner of a chose in action as opposed to another party, such as the Par One #1 Condominium Association (the "Association"), Robert MacKinnon, or Denis Nuhic, the Debtor has not pled this in the Adversary Complaint. Moreover, the Debtor has failed to include all necessary parties, including one assumes, the Association, Mr. MacKinnon, Hayden Building Maintenance Corporation, or Mr. Nuhic. . . . More importantly, the Association is the only rightful owner of an invalidly assigned putative claim against Heritage, and the Association is entitled to notice and an opportunity to be heard.

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[1] In effect, the Defendant asks the Court to rule on the merits of a defense to the Par Action. The Court takes judicial notice of the docket in the Par Action, Case No. 2018-CA-001563, pending in the Twentieth Judicial Circuit Court in and for Collier County, Florida, in which case the Defendant has filed a motion to amend its answer and affirmative defenses to add a defense under § 865.09, Fla. Stat. Because the Complaint in this proceeding does not seek resolution of the Par Action, the Court will respond to these defensive arguments raised here by the Defendant without resolving them on the merits. With respect to the Par Action, the Court takes further notice that the Plaintiff has filed a motion in that case to amend the complaint to correct its fictitious name by omitting "LLC."

[2] The fictitious name was written in the signature block within a minor scrivener's error, with the "s" having been omitted from the word "Solutions."

Notwithstanding this language, the Defendant has not represented that it has been subjected to any competing claims(s) for coverage, and the Court knows of no such claim(s). All parties identified by the Defendant in the Motion as "necessary" are on notice of the Debtor's prosecution of the Par Action. Thus, if they dispute the Plaintiff's entitlement to recovery in that action, they are free to seek intervention there.

Moreover, with respect to the Defendant's request for dismissal, as well as its request for the alternative relief just described, the Defendant misconstrues the demand for declaratory judgment included in the Complaint. The Plaintiff filed the current proceeding for a declaratory judgment that the Par Action is estate property. Thus, the resolution of this proceeding requires only this Court's application of 11 U.S.C. § 541, which describes "property of the estate" within the meaning of the Bankruptcy Code. The Plaintiff has not sought a determination relating to the validity of the AOB or any other determination concerning the merits of the Par Action. Nor would this Court entertain a request for such determination even if made.

Under § 541(a), estate property includes "all legal and equitable interests of the debtor in property as of the commencement of the case." Although certain exclusions to this definition are set out in subsections (b) and (c)(2) of § 541, the Defendant has not urged the application of any specific exclusion. Instead, although the Defendant concedes in the Motion that "a debtor's causes of action constitute estate property," the Defendant argues, in effect, that the Par Action is not estate property because the Plaintiff's use of its fictitious name followed by "LLC"—in a single instance in the AOB and in the initial pleading in the Par Action—constitutes an incurable error that will necessarily result in the dismissal of the Par Action. None of the cases cited by the Defendant stands for that proposition. Even if, *arguendo*, an incurable error did occur in connection with the Plaintiff's use of its fictitious name, such error may be raised as an affirmative

defense.[3] Section 865.09, the statute upon which the Defendant relies, is not self-executing, and an alleged violation of this statute may be waived if not raised in timely manner.[4] Thus, the mere fact that the Par Action *might* be subject to an affirmative defense related to the Plaintiff's use of its fictitious name—or any other defense for that matter—does not mean the Par Action is not property of the estate.[5]

Based on the foregoing, the Court concludes that the Motion should be denied. However, on March 9, 2021, prior to the entry of an order denying the Motion, the Plaintiff filed a Notice of Dismissal of this proceeding. Accordingly, it is

**ORDERED** that the Motion has become moot following the Plaintiff's voluntary dismissal of this proceeding.[6]

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[3] *See, e.g., Sealy v. Perdido Key Oyster Bar and Marina, LLC*, 88 So. 3d 366 (Fla. 1st DCA 2012). As noted above, the Defendant has, in fact, attempted to raise this defense in the Par Action. *Supra* note 1.

[4] *Jackson v. Jones*, 423 So. 2d 972, 973 (Fla. 4th DCA 1983) ("A party seeking to obtain [§ 865.09's] benefit must take appropriate action to bring the matter to the attention of the court and to obtain an appropriate ruling."). *See also Cor-Gal Building, Inc. v. Southard,* 136 So. 2d 244, (Fla. 3rd DCA 1962).

[5] Although the Court does not decide the issue, it is not convinced that this affirmative defense would prevail in any event. For example, it is uncertain whether inclusion of "LLC" in connection with an otherwise identical registered fictitious name justifies treating that name as "unregistered" for purposes of applying the case law the Defendant cites in the Motion. Further, the statute cited in support of the Defendant's position, § 865.09, Fla. Stat., states in subsection (9)(a) that "[i]f a business fails to comply with this section, neither the business nor the person or persons engaging in the business may maintain any action, suit, or proceeding in any court of this state with respect to or on behalf of such business *until this section is complied with.*" (Emphasis added.) *See also* § 865.09(9)(b), Fla. Stat. ("The failure of a business to comply with this section does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of such business.").

[6] This order recognizes that the Motion is moot; thus, this order has no precedential value. The Court enters this order primarily for the educational value to those interested in bankruptcy jurisprudence so that they may understand that a debtor's cause of action that an opponent might characterize as a "total loser" is nonetheless "property of the estate" within the meaning of the Bankruptcy Code. Further, having previously taken the Motion under advisement, considered the respective parties' papers at great length, and substantially completed drafting an order on the Motion prior to the voluntary dismissal, entry of this order also serves to "clean up" a "loose end," so to speak. *See, e.g., Lawson v. Tilem (In re Lawson)*, 156 B.R. 43, 45 (B.A.P. 9th Cir.) (citation omitted), *aff'd*, 999 F.2d 543 (9th Cir. 1993) (court's exercise of residual jurisdiction following dismissal of a case is left to the court's discretion); *In re Sweports, Ltd.*, 777 F.3d 364, 367 (7th Cir.) (court has "clean up" or ancillary jurisdiction, after dismissal, to hear matters resolving "minor loose ends"), *cert. denied*, 135 S. Ct. 2811 (2015).

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